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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1132

MICHAEL IRVIN CANON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DOUGLAS G. CROSBY, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

MICHAEL IRVIN CANON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner MICHAEL IRVIN CANON respectfully prays that a Writ of Certiorari issue to review the memorandum order of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 12, 1976.

OPINION BELOW

The memorandum order of the United States Court of Appeals for the Ninth Circuit was filed on January 12, 1976. This memorandum and order has not been reported and is reproduced herein as Appendix "A".

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JURISDICTION

The memorandum order of the United States Court of Appeals for the Ninth Circuit, entered on January 12, 1976, directed that no petition for rehearing may be filed,[1] and directed the mandate issue twenty-one (21) days from January 12, 1976. On January 26, 1976 a timely motion to stay the issuance of the mandate was filed in the United States Court of Appeals for the Ninth Circuit and said motion was granted providing a petition for writ of certiorari is filed by February 11, 1976. This Court's jurisidiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court should have granted CANON'S motion for a protective order prior to ordering CANON to testify.

2. Whether the District Court should have instructed the Government to comply with Title 18 U.S.C. § 3504 and given CANON an opportunity to facially challenge any electronic surveillance.

3. Whether the Court of Appeals should have remanded the case to the District Court for reconsideration in light of the Government's untimely affidavit pursuant to Title 18 U.S.C. § 3504.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2515. Prohibition of use as evidence of intercepted wire or oral communications.

[1] Appendix, pages 1a-2a.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * *

(c) a full and complete statement of the facts concerning all previous applications known to the

individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

* * *

18 U.S.C. § 3504. Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States–

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

* * *

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

18 U.S.C. § 6002. Immunity generally.

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to–

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a

subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

STATEMENT OF THE CASE

On November 7, 1975, Petitioner was served with a subpoena directing him to appear and testify before a Federal Grand Jury sitting in the District of Nevada at Las Vegas, Nevada. The subpoena directed Petitioner to appear on November 13, 1975; however, with consent of the Government attorney Petitioner's appearance was postponed until November 20, 1975.

Petitioner appeared before the Grand Jury on November 20, 1975, gave his name and declined to answer further questions, asserting his privilege against self-incrimination. Petitioner was then excused and directed to return on November 26, 1975.

On November 26, 1975, Petitioner returned to the Grand Jury and again declined to answer questions for the same reasons. That same day, Petitioner was served with an Order of Immunity signed by the Honorable ROGER D. FOLEY, District Judge (R.Vol.I. pp. 10-11). Petitioner was then directed to return to the Grand Jury on December 4, 1975.

The Government filed on November 28, 1975, a motion requesting the Court to direct Petitioner to answer questions and a notice of intent to seek a contempt order should he still decline to answer (R.Vol.I. pp. 12-15).

Prior to Petitioner reappearing before the Grand Jury he filed a motion for protective order (R.Vol.I. pp. 22-26) and a memorandum in opposition to a contempt hearing (R.Vol.I. pp. 17-21).

Petitioner again, on December 4, 1975, declined to answer questions, responding instead as follows:

> "I will respectfully to [sic] refuse to answer on the grounds of the Fifth Amendment even though an immunity order has been entered, and the immunity order does not conform to the application of immunity, and that the Court has not ruled on my motion for protective order, and these questions resulted from unlawful electronic surveillance." (R.Vol.II. p. 10).

The above answer was read to Judge FOLEY by the Grand Jury stenographer at a hearing on the Government's application for a contempt order. At that hearing, Judge FOLEY considered the arguments of counsel relative to Petitioner's motion for a protective order. The motion was taken under submission (R.Vol.II. p. 49) and the matter was recessed until December 5, 1975.

On December 5, 1975, Petitioner's motion for a protective order was denied in its entirety (R.Vol.II. p. 51) and Petitioner was directed to return to the Grand Jury (R.Vol.II. p. 52). Petitioner again declined to answer questions before the Grand Jury and he was then returned to Court at which time CANON was held in contempt.

During the contempt hearing on December 5, 1975, CANON again raised a claim pursuant to Title 18 U.S.C. § 3504 and requested the Government be directed to comply with that Section (R.Vol.II. p. 79). This request was denied.

CANON'S notice of appeal was filed December 12, 1975 (R.Vol.I. p. 52).

Subsequent to December 12, 1975, the Government *ex-parte* filed on December 19, 1975 an affidavit entitled "Affidavit of RICHARD A. WRIGHT, Assistant United States Attorney, In Accordance With Title 18, United States Code, Section 3504." (R.Vol.I. pp. 61-67). That affidavit alleges a series of court authorized wiretaps in which CANON was intercepted. It appears from that affidavit that Petitioner was named as a subject in two of the four authorization orders, those being November 22, 1974, in the Northern District of Alabama, and October 24, 1975, in the District of Nevada; the latter being a source of information upon which the questions asked of Petitioner before the Grand Jury were based.

Petitioner argued before the United States Court of Appeals for the Ninth Circuit that the "affidavit" be stricken from the record on appeal since it was not timely filed in the District Court and that the matter should be remanded to the District Court for reconsideration in light of the "affidavit" which was not before the District Court when Petitioner was held in contempt. The Court of Appeals declined to do so.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT SHOULD HAVE GRANTED CANON'S MOTION FOR A PROTECTIVE ORDER PRIOR TO ORDERING CANON TO TESTIFY.

Subsequent to the Order of Immunity which was entered on November 26, 1975, Petitioner filed a motion for protective order which requested, *inter alia*:

> "That the Government be required to certify to this Court in writing a detailed outline of any incriminating evidence against Michael Irvin Canon which the Government has in its possession prior to this Court's compelling Canon to testify; it is suggested that the Court seal the certification of evidence subject to further order of the Court." (R.Vol.I. p. 22).

Title 18 U.S.C. § 6002 states that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony) may be used against the witness in any criminal case." In *Kastigar v. United States*, 406 U.S. 441 (1972) the Supreme Court held that once an indicted witness shows that he or she has been compelled to testify under a grant of immunity, the Government bears the burden of proving that its evidence is not tainted by establishing an entirely independent and legitimate basis for it.

Despite the fact that the *Kastigar* Court termed the imposition of such a burden "very substantial protection", 406 U.S. at 461, it is submitted that the precautionary step of certification of evidence by the

Government be taken to insure that any immunized and compelled testimony of a witness will in no way contribute to a criminal prosecution against him.

If this precautionary measure is not taken, the proof problems surrounding subsequent use of immunized testimony may be very great. The concern that impermissible use of immunized testimony may not be uncovered was clear in both the majority and dissenting opinions in *Kastigar, supra.*

The prohibition on subsequent use of immunized testimony should not be limited to evidence introduced at trial. *Kastigar, supra,* forbids the use of compelled testimony "in any respect". 406 U.S. at 453. The *Kastigar* Court specifically stated that "the use of compelled testimony as an investigatory lead; and also . . . the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures" was barred. 406 U.S. at 460.

The precautionary step stated above was suggested in "Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli", 82 Yale L.J. 171 (1972) as one means of insuring full protection of an immunized witness. Such a procedure has been employed by at least one district court in the Ninth Circuit when Judge TURRENTINE ordered certification of evidence *in camera. In re Weir,* 377 F.Supp. 919, 520 F.2d 662 (9th Cir., 1975). Additionally, the Second Circuit has suggested that certification of evidence is an appropriate means of protecting both the Government and a defendant prior to the compulsion of testimony. *Goldberg v. United States,* 472 F.2d 513, 516 n.5 (1973).

Secondly, Petitioner in his motion for protective order sought an order prohibiting the Government from

seeking an indictment against Petitioner from the same Grand Jury he was ordered to give testimony to. (R.Vol. I. p. 22). This request was also denied.

It is submitted that such a precaution is necessary for the reason that once a Grand Jury hears incriminating testimony from a witness, there is no way that the Grand Jury can ignore it, that is, not "use" the witness' testimony against him in a decision to indict the witness.

Petitioner's concern in this regard was discussed in *Goldberg v. United States, supra,* wherein the Court stated:

> "We would be greatly troubled by what has happened here if the Government were seeking an indictment of Goldberg from the grand jury before which he is being asked to testify. Although the order to compel testimony might be valid, we would have most serious doubt about the validity of such an indictment. Despite any instructions from the judge, it would be well nigh impossible for the grand jurors to put Goldberg's answers out of their minds, *cf.* Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and testimony compelled by the order would thus 'be used against the witness in [a] criminal case,' *cf.* Kirby v. Illinois, 406 U.S. 682, 688-689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), in defiance not only of 18 U.S.C. § 6002 but of the command of *Kastigar* that the immunity must be 'coextensive with the scope of the privilege.' 406 U.S. at 449, 92 S.Ct. at 1664. But the Government represented to us in open court that the grand jury before which Goldberg has been directed to answer questions will not be asked to indict him." 472 F.2d at 516.

Petitioner asserts that the safeguards discussed herein should have been implemented by the District Court

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prior to Petitioner's having to make the difficult decision to testify or suffer the consequences which have been imposed upon him.

II.

THE DISTRICT COURT SHOULD HAVE INSTRUCTED THE GOVERNMENT TO COMPLY WITH TITLE 18 U.S.C. § 3504 AND GIVEN PETITIONER AN OPPORTUNITY TO FACIALLY CHALLENGE ANY ELECTRONIC SURVEILLANCE.

Petitioner asserted a claim of unlawful electronic surveillance in both his written objection to a contempt hearing (R.Vol. I. p. 18) and orally during the contempt hearing (R.Vol. II. p. 75). The District Court, however, refused to direct the Government to respond in compliance with Title 18 U.S.C. § 3504 which provides, *inter alia*:

> "(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act; . . ."

The prohibition of Title 18 U.S.C. § 2515 is available to a subpoenaed and immunized grand jury witness in defense of a contempt citation. *Gelbard v. United States*, 408 U.S. 41 (1972).

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The Court of Appeals for the First Circuit has ruled that in order to give effect to the prohibition of Title 18 U.S.C. § 2515 in a court authorized wiretap situation, a witness is entitled to an opportunity for inspection of the following limited materials: the authorization of the Attorney General or his designate, the affidavits in support of the court order, the court order, and an affidavit from the Government as to length of time the surveillance was conducted. *In re Lochiatto*, 497 F.2d 803 (1974). The limited review permitted by *Lochiatto* is not the type of "full-blown suppression hearing" with which the Second Circuit Court of Appeals was concerned about in *In the Matter of Persico*, 491 F.2d 1156 (1974).

The Government relied below on *Droback v. United States*, 509 F.2d 625 (9th Cir., 1974); *cert. denied*, 95 S.Ct. 1952, wherein the Court held that an immunized witness was not entitled to a "full-fledged suppression hearing" to question the validity of a court ordered wiretap. Unfortunately, the printed opinion does not set forth the facts in *Droback*. However, a review of Droback's reply brief, filed in the Ninth Circuit points out two distinguishing factors between that case and the instant case. First, Droback, prior to his immunization, had been dismissed by the Government from the pending indictment, and secondly, Droback had already lost his wiretap suppression motion in connection with the indictment.

Finally, it should be pointed out that in *Droback* the Court viewed the situation as one in which Droback was "seeking to convert his contempt proceeding into a bystander's action to test the legality of a surveillance program which is likely to produce evidence against one or more of his associates." 509 F.2d at 626. Such is not the situation herein.

In the instant case, Petitioner was a target defendant of the Grand Jury's investigation (R.Vol. II. p. 10) and unlike *Droback*, there has been no prior determination of the legality of the wiretap.

It is respectfully submitted that Petitioner is entitled to a review of the underlying wiretap materials. Furthermore, adequate time to review said documents and prepare a defense to a contempt citation is mandated by the guarantee of due process as stated in *United States v. Alter*, 482 F.2d 1016 (9th Cir., 1973); wherein the Court citing *Goldberg v. Kelly*, 397 U.S. 254 (1970), said:

> "Moreover, the hearing Alter received was not the 'uninhibited adversary hearing' contemplated by section 1826(a). (United States v. Dinsio, supra, 468 F.2d at 1394). The hearing was largely confined to the perfunctory reception of affidavits, a round of oral argument, and some offers for the record. That 'uninhibited adversary hearing' recognized by Harris and most recently reaffirmed by Dinsio requires, at the very least, that a witness be allowed to probe all nonfrivolous defenses to the contempt charge. The constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and vigorous debate on both sides of all substantial issues. 'The fundamental requisite of due process of law is the opportunity to be heard' . . . The hearing must be 'at a meaningful time and in a meaningful manner.' " 482 F.2d at 1024.

III.

THE COURT OF APPEALS SHOULD HAVE REMANDED THE CASE TO THE DISTRICT COURT FOR RECONSIDERATION IN LIGHT OF THE GOVERNMENT'S UNTIMELY AFFIDAVIT PURSUANT TO TITLE 18 U.S.C. § 3504.

Notwithstanding the failure to do so in the District Court prior to Petitioner being held in contempt, the Government felt compelled to file an affidavit pursuant to Title 18 U.S.C. § 3504, even though not timely. Petitioner contends that the Court of Appeals should have remanded the matter to the District Court for reconsideration and at the very least, an in camera facial review of the October 24, 1975 wiretap materials in view of the Government's statement that Petitioner had in fact been the subject of a prior electronic surveillance authorization order. *In the Matter of Persico*, 491 F.2d 1156 (2nd Cir., 1974); *In re Quinn*, 525 F.2d 222 (1st Cir., 1975).

Without the opportunity to examine the limited wiretap materials, *Lochiatto, supra*, or at least an in camera review, *Persico, supra*, the restriction of Title 18 U.S.C. § 2515 has no meaning.

For example, in light of the Government's untimely disclosure that Petitioner was named in a prior order authorizing electronic surveillance, did the application submitted to Judge FOLEY, which resulted in his authorization order of October 24, 1975, meet the requirements of Title 18 U.S.C. § 2518(1)(e)? That Section requires that:

> "(1) Each application for an order authorizing or approving the interception of a wire or oral

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communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

* * *

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the Judge on each such application; . . ."

If the Government failed to comply with this section then the electronic surveillance conducted on Petitioner pursuant to the order of October 24, 1975 was "unlawful". *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir., 1974).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DOUGLAS G. CROSBY, ESQ.
Goodman and Snyder
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner

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CERTIFICATE OF SERVICE

It is hereby certified that true and correct copies of the above and foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit was mailed this 9th day of February, 1976, postage prepaid, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D.C. 20530.

DOUGLAS G. CROSBY, ESQ.

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APPENDIX A

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. MICHAEL IRVIN CANON, *Defendant-Appellant.*	No. 75-3811 MEMORANDUM

[January 12, 1976]

Appeal from the United States District Court
for the District of Nevada

Before: CHAMBERS, DUNIWAY, and SNEED, Circuit Judges.

An immunized witness, Canon, appeals from an order of the District Court holding him in contempt for refusing to comply with an order that he answer certain questions put to him as a witness before a grand jury, and committing him to the custody of the Attorney General until he purges himself of the contempt or until the life of the grand jury expires.

Canon's motion to strike from the record on appeal an affidavit filed by the government in the District Court on December 19, 1975, seven days after the Notice of Appeal was filed, and fourteen days after entry of the order appealed from, is granted. The affidavit was not before the District Court when it made its order and, therefore, is not a proper part of the record on appeal. We express no opinion as to the significance or effect of the affidavit in the District Court.

The law does not require that the District Court make the type of protective order or orders that Canon asked for, although the Court, in its discretion, could have done so. *Cf. Goldberg v. United States,* (2nd Cir. 1973) 472 F.2d 513, 516, n. 5; *In re Weir,* (S.D. Cal. 1974) 377 F. Supp. 919, *aff'd.* (9th Cir. 1975) 520 F.2d 662.

Our reading of the record, and particularly the colloquy between counsel and the judge at Tr. pp. 80-2, leads us to agree with the District Judge that no sufficient claim of illegal surveillance was made under Title 28 U.S.C. Sec. 3504. *See United States v. See,* (9th Cir. 1974) 505 F.2d 845. As to the attack upon the Court-authorized electronic surveillance of Canon, he is not permitted, as a recalcitrant witness, to delay the grand jury proceeding while he litigates the question of the validity of the surveillance. *Droback v. United States,* (9th Cir. 1974) 509 F.2d 625; *In re Persico,* (2nd Cir. 1974) 491 F.2d 1156. We have not followed *In re Lochiatto,* (1st Cir. 1974) 497 F.2d 803. *See Droback, supra.*

The order appealed from is affirmed. No petition for a rehearing may be filed. The mandate will issue 21 days after the filing of this Memorandum.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1132

MICHAEL IRVIN CANON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1976. The petition for a writ of certiorari was filed on February 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an immunized grand jury witness is entitled to a protective order requiring the government to submit a detailed outline of its then existing evidence against him before he is required to testify.

2. Whether a grand jury witness who was the subject of court-ordered electronic surveillance is entitled to liti-

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gate the validity of such surveillance in civil contempt proceedings and thereby delay the grand jury's investigation.

3. Whether petitioner made a sufficient claim under 18 U.S.C. 3504 to require the government to affirm or deny the existence of illegal electronic surveillance.

STATEMENT

In November 1975, a federal grand jury in Nevada was conducting an investigation of unlawful gambling activities in the State. On November 20, petitioner was called to testify before the grand jury. Apart from identifying himself, he invoked his Fifth Amendment privilege against compulsory self-incrimination and refused to answer any further questions. The United States Attorney thereupon sought and was given approval to apply for an order granting petitioner use immunity and requiring him to testify. On November 26, the United States District Court for the District of Nevada (Chief Judge Foley) approved the request for use immunity under 18 U.S.C. 6002 and ordered petitioner to "return to the grand jury room forthwith and answer all questions propounded to him there as well as in any subsequent proceeding or trial which may result from the grand jury's current inquiry" (R. 10-11)[1].

That same day, petitioner again appeared before the grand jury. He persisted in his refusal to testify on Fifth Amendment grounds. In addition, petitioner claimed that, before answering the grand jury's questions, he was entitled to challenge a previous order of the court authorizing electronic surveillance (R. 14).

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[1]"R." refers to the portion of the record on appeal containing the clerk's record in the district court. "Tr." refers to the reporter's transcript of the hearings.

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On November 28, 1975, the government requested the district court to direct petitioner to testify before the grand jury, and it served notice that a contempt citation would be sought if petitioner refused to comply with the court order (R. 12-13). A hearing on that motion was held before Judge Foley on December 4, 1975. At that time, the judge modified the immunity order to require petitioner to return to the grand jury room forthwith and to "answer all questions propounded to him there as well as in any subsequent proceeding before the Grand Jury in connection with its current inquiry" (R. 33; Tr. 12-14). Petitioner moved for a protective order, requiring the government to proffer the existing inculpatory evidence against him as a predicate to his prospective grand jury testimony; the motion was taken under advisement (R. 22-23).

On December 5, 1975, the court denied the motion for a protective order and rejected petitioner's Fifth Amendment and electronic surveillance claims. It directed petitioner to appear before the grand jury and answer the questions propounded (R. 33; Tr. 51-52). Petitioner returned to the grand jury room, where he was asked some 48 questions (Tr. 5-8). After each question, petitioner stated: "I decline to answer on the grounds that the Court improperly denied my motion for protective order and this Grand Jury has been unlawfully impaneled and that these questions result from unlawful electronic surveillance" (R. 36; Tr. 53-54).

A contempt hearing was held on December 5 before Judge Foley. Petitioner was adjudged to be in civil contempt of the court's orders, and he was committed to the custody of the United States Marshal until he purged himself of the contempt or for the life of the grand jury (R. 38-40; Tr. 82-83). However, Judge Foley subsequently granted petitioner bail pending appeal. The court of

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appeals affirmed the district court's judgment of civil contempt but, on February 2, 1976, it stayed its mandate pending petitioner's filing of his petition for certiorari and it continued him on bail.

ARGUMENT

1. Although properly immunized under 18 U.S.C. 6002, petitioner claims (Pet. 8-11) that he ought to be able to assert as a defense to a finding of civil contempt the district court's failure to enter a protective order requiring the government to submit a detailed outline of the evidence against him before he testifies in the grand jury. He also argues that the government should be prohibited from seeking an indictment from the same grand jury before which he testifies. However, neither the Constitution nor the immunity statute entitles petitioner to such protections.

This Court has held that the use and derivative use immunity provided by 18 U.S.C. 6002 is "coextensive with the scope of the privilege against self-incrimination" (*Kastigar* v. *United States*, 406 U.S. 441, 453) and is therefore "constitutionally sufficient to compel testimony over a claim of the privilege" (*id.* at 458). Such immunity "insures that the testimony cannot lead to the infliction of criminal penalties on the witness" (*id.* at 453) and is thus "all that the Constitution requires * * *" (*id.* at 459).

The short answer to petitioner's claims is that they are premature and afford no ground for his refusal to testify before the grand jury. Petitioner has not been indicted by this or any other grand jury for any activities that he may be called upon to testify about under this grant of immunity, nor is there any indication that he will be indicted. Should he be hereafter indicted, the prosecution in any such case would have the burden affirmatively "to prove that the evidence it proposes to use is derived

from a legitimate source wholly independent of the compelled testimony." *Kastigar* v. *United States, supra,* 406 U.S. at 460. While petitioner has suggested one step that could be taken by the government to assist it in shouldering that burden should it hereafter become necessary to do so, he surely has no right to insist that we protect our hypothetical future prosecutive interests by such measures or to invoke our lack of caution as grounds for refusing to give immunized testimony. It will be time enough to worry about impermissible use of petitioner's immunized testimony if and when he is ever indicted. See *Goldberg* v. *United States,* 472 F. 2d 513, 516 (C.A. 2).

The same answer applies to petitioner's demand that his immunized testimony be preceded by an order prohibiting this grand jury from indicting him. Perhaps such an indictment would be subject to successful attack, but the ability to attack the indictment if one is in fact handed down — a "remote and speculative possibility[y]" (*Zicarelli* v. *New Jersey Investigation Commission,* 406 U.S. 472, 478) — affords petitioner a wholly adequate remedy. There is simply no need for any such order at this time.

2. Petitioner urges that 18 U.S.C. 2515[2] provides a grand jury witness with a defense in civil contempt proceedings under 28 U.S.C. 1826(a), when it is alleged that questioning before the grand jury may derive from information acquired through unlawful electronic surveillance, even though the surveillance was conducted pursuant to court order. From this premise, petitioner argues that, in order to test the legality of the surveillance, he should have been allowed to inspect the underlying application and affidavits and the order authorizing

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[2]This and the other statutes referred to herein are set forth in the petition at pp. 2-5.

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the interceptions to determine their facial validity (Pet. 11; Tr. 70).[3]

In *Gelbard* v. *United States*, 408 U.S. 41, this Court held that Section 2515 provides a defense to a contempt citation when the interception was not conducted pursuant to court order. The Court left undecided, however, the question presented here: whether witnesses "may refuse to answer questions if the interceptions of their conversations were pursuant to court order" (408 U.S. at 61, n. 22). In our view, an immunized witness should not be permitted to litigate the validity of court-authorized electronic surveillance.[4] Here, petitioner was advised that

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[3]It is not entirely clear from the petition whether this is petitioner's argument or whether he asserts that he was entitled to a plenary hearing to test the legality of the court-ordered surveillance. However, his claim in the district court was limited (Tr. 70): "We're not talking about a full-blown or plenary suppression hearing. We're talking about a limited review of these limited materials in order to possibly point out on their face improprieties in these documents which may render the wiretap unlawful. And we're not talking about calling FBI agents to the stand to question them about information that's contained in the affidavits as to the credibility of that information. We're talking about the facial review of the documents and an opportunity to point out potential facial defects to the Court in those documents."

[4]As Mr. Justice White suggested in his concurring opinion in *Gelbard* (408 U.S. at 70):

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time, prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and, in any event, the deterrent value of excluding the evidence will be marginal at best.

Judge Foley had signed an order for electronic surveillance (Tr. 21; R. 18) and that he had been intercepted through such surveillance conducted during the period from October 24, 1975, through November 6, 1975 (R. 18). He was entitled to no more. See *Droback* v. *United States*, 509 F. 2d 625 (C.A. 9), certiorari denied, 421 U.S. 964; *In re Persico*, 491 F. 2d 1156 (C.A. 2), certiorari denied, 419 U.S. 924; cf. *United States* v. *Calandra*, 414 U.S. 338.

Petitioner argues, however, that under the First Circuit's decision in *In re Lochiatto*, 497 F. 2d 803, he should have been afforded the opportunity to examine the application for the electronic surveillance and supporting affidavits, the court's order authorizing the surveillance, and an affidavit specifying the time period of the surveillance. While petitioner was not afforded all that *Lochiatto* requires in the ordinary case, he was advised of the existence of the court order and told of the period of surveillance. In any event, the decision here does not conflict with *Lochiatto*. As the First Circuit there noted, when the government interposes an objection to disclosure on secrecy grounds, the court would have discretion to review the materials *in camera* to determine the validity of the surveillance. This procedure, said the First Circuit, would secure the "triple objective" of "minimiz[ing] the delay, secur[ing] the government's interest, if any, in secrecy, and protect[ing] a defendant's right to assert the defenses Congress established" (497 F. 2d at 807).

Here, the grand jury was conducting an on-going inquiry into illegal gambling, and the court knew when it approved the order that the surveillance was designed to gather incriminating evidence against "big people" involved in illegal gambling activities (Tr. 21). Moreover,

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the government indicated the need for secrecy by stating (Tr. 97) that if petitioner were advised of the nature and results of the electronic surveillance, it would be difficult "to evaluate his truthfulness" in the grand jury. "He will know what we know or who have [*sic*] been identified at that point and time. And he can fashion his testimony to who we know and not tell us about those people we don't know." Thus, it was reasonable for the court to assume that secrecy was essential if the investigation was not to be jeopardized. Its refusal to allow petitioner to inspect the materials was therefore permissible under *Lochiatto* and was reasonable in the circumstances.

There is a further distinction between this case and the *Lochiatto* case. Here, by contrast with *Lochiatto*, the same judge (Chief Judge Foley) who had approved the electronic surveillance order also presided over the contempt proceedings. See Tr. 21, 35. He was therefore familiar with the materials which the *Lochiatto* court deemed appropriate for inspection, and he had previously found them to be facially sufficient or he would not have ordered the surveillance. For Judge Foley to have conducted a second evaluation of the facial validity of these same materials would have been a pointless act of repetition, wholly frustrating one of the objectives recognized in both *Gelbard* and *Lochiatto*, namely, minimizing the delay and disruption of grand jury proceedings.

In sum, the decision not to disclose the materials to petitioner was reasonable in the circumstances, and Chief Judge Foley, who had authorized the surveillance in the first place, was not required again to inspect the materials *in camera*. Although the district court and the court of appeals expressly declined to follow *Lochiatto*, a different result would not necessarily have been reached

had they chosen to apply the holding in that case. Accordingly, there is no need for further review of the issue in this case.

3. Finally, petitioner contends that the government should have been required to affirm or deny the existence of illegal electronic surveillance. Presumably, he is referring to surveillance, if any, beyond the court ordered interceptions discussed above. However, as the court of appeals properly concluded, the record demonstrates that petitioner has failed to make a sufficient "claim" of illegal surveillance within the meaning of 18 U.S.C. 3504(a)(1).[5]

During the hearing in the district court, petitioner's counsel requested the government to state "that the only electronic surveillance that was conducted, which resulted in [petitioner's] being subpoenaed to the Grand Jury, was court-authorized, and that court-authorized wiretap was in no way supported by any unauthorized wiretap; also, that there has been no unauthorized wiretap on [petitioner]" (Tr. 79-80). Petitioner's counsel made no assertion that any such unlawful electronic surveillance had in fact occurred or that petitioner's appearance before the grand jury was occasioned by the exploitation of such evidence.

Thereupon, the following colloquy took place between the district court and petitioner's counsel, Mr. Crosby (Tr. 80-82):

> THE COURT: * * * I see. You want the Government to avow that no other surveillance than the court-ordered surveillance took place as a result of which [petitioner's] voice was heard on the wiretaps?

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[5] 18 U.S.C. 3504(a)(1) requires the government to "affirm or deny the occurrence of the alleged unlawful act" when "a party aggrieved" makes a "claim" that evidence is inadmissible because it is "the primary product of an unlawful act."

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MR. CROSBY: That is correct.

THE COURT: Well, I think you can probably get an oral avowal of that from Mr. Liset [the Assistant United States Attorney].

MR. CROSBY: I'm not sure Mr. Liset can do that without checking with the necessary agencies which may have at one time or another wiretapped [petitioner].

THE COURT: Well, are you fishing or are you suspecting?

MR. CROSBY: I'm just asking at this point for the Government to comply with 3504.

THE COURT: You're fishing.

MR. CROSBY: Well, if that's what 3504 means, then I guess I'm fishing, Your Honor.

THE COURT: Well, you're not making a claim, though. You're asking a question.

MR. CROSBY: We've raised the claim in our defense to this hearing.

THE COURT: Well, aside from the court-authorized interception apparently you're not saying that there was any other, you just want to make certain there wasn't?

MR: CROSBY: That's correct, Your Honor.

THE COURT: Well, 3504 reads: (reading)

"In any hearing"—and so forth "before a Grand Jury, upon a claim by a party aggrieved that the evidence is inadmissible because it is the primary produce [*sic*] of an unlawful act or because it was obtained by the exploitation of an unlawful act."

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> And it seems to me you've got to more than say, "I wonder if there was other surveillance?" I don't think that point is well taken.

On this record, the district court properly denied petitioner's request that the government affirm or deny the existence of any unlawful electronic surveillance. While a "mere assertion" of unlawful surveillance has been found sufficient by some courts to necessitate a governmental response (see, *e.g., In re Evans*, 452 F.2d 1239, 1247 (C.A.D.C.), certiorari denied, 408 U.S. 930), 18 U.S.C. 3504 clearly requires, as a bare minimum, that the defendant actually claim that illegal surveillance has occurred and that evidence gained therefrom is therefore inadmissible. See *United States* v. *See*, 505 F. 2d 845, 855-856 (C.A. 9), certiorari denied *sub nom. Gordon* v. *United States*, 420 U.S. 992; *United States* v. *Toscanino*, 500 F. 2d 267 (C.A. 2); *United States* v. *D'Andrea*, 495 F. 2d 1170 (C.A. 3). As the Fifth Circuit recently held in *United States* v. *Tucker*, 526 F.2d 279, 282, petition for certiorari pending, No. 75-1192:

> [S]uch an "assertion" must be, at a minimum, a positive statement that unlawful surveillance has taken place. A generalized motion based on the possibility of such surveillance, which is all that is present here, is not a "claim" within the meaning of 18 U.S.C. §3504(a)(1).

Petitioner has failed to make even the minimal showing required. His motion was simply "a fishing expedition" (*United States* v. *See, supra*, 505 F. 2d at 856), and the district court was accordingly correct in finding that it did not entitle him to put the government to the trouble of canvassing the various agencies whose law enforce-

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ment techniques include the use of electronic surveillance.[6]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys.

MAY 1976.

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[6]In view of petitioner's threshold failure to raise a statutory "claim," there is no occasion to remand this case to the district court to consider whether an affidavit submitted during the pendency of appeal—which disclosed that the only electronic surveillance of petitioner had been pursuant to court order—satisfied Section 3504.

Supreme Court, U. S.
FILED
JUN 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1132

MICHAEL IRVIN CANON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OSCAR B. GOODMAN, ESQ.
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563
Attorney for Petitioner.

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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MICHAEL IRVIN CANON,

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PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO: The Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that this Petition for Rehearing for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be considered.

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REASONS FOR FILING PETITION FOR REHEARING

On February 10, 1976, the Petitioner Michael Irvin Canon, filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit containing three questions presented to this Honorable Court (the writ of certiorari heretofore filed is incorporated herein by reference *in toto.*) The question herein presented was not included in the original petition for a writ of certiorari.

On May 24, 1976, this Honorable Court denied the petition for a writ of certiorari.

On January 8, 1976, the United States Court of Appeals for the Third Circuit filed an opinion in a case captioned *In the Matter of Grand Jury Empaneled January 21, 1975,* cited at 529 F.2d 543 (1976). The Third Circuit opinion deals with what sanction should be imposed upon a contemnor who initially refuses to comply with a court order which led to the finding of contempt. Counsel for Petitioner, being unaware of the Third Circuit opinion, did not include this question in the original petition for certiorari.

SUPPLEMENTAL QUESTION PRESENTED

1. Should the District Court who found the Petitioner in contempt have applied a more minimal degree of coercion to have gained compliance with its order.

STATUTE INVOLVED

28 U.S.C. § 1826(a) states as follows:

§ 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of–

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

STATEMENT OF THE CASE

The Petitioner herein adopts and incorporates the Statement of the Case as contained in the original petition for a writ of certiorari filed February 10, 1976. In addition thereto, it should be noted that the Court stated:

"The witness, MICHAEL IRVIN CANON, has wilfully disobeyed the lawful Orders of this Court and is in contempt of the Orders of this Court. The witness, MICHAEL IRVIN CANON, is hereby committed to the custody of the United States

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Marshal until he purges himself of that contempt. Such confinement shall not extend beyond the term of the present Grand Jury."

REASON FOR GRANTING THE PETITION FOR REHEARING

I.

THE DISTRICT COURT WHO FOUND THE PETITIONER IN CONTEMPT SHOULD HAVE APPLIED A MORE MINIMAL DEGREE OF COERCION TO HAVE GAINED COMPLIANCE WITH ITS ORDER.

It is submitted that after adjudging Michael Irvin Canon to be in civil contempt, the Court should have fined him as a coercive sanction rather than to have imposed a term of incarceration to force compliance with its Order. Title 28 U.S.C. 1826(a) permits a coercive fine to be imposed on a contumacious witness. *Matter of Grand Jury Empaneled January 21, 1975,* 529 F.2d 543 (3rd Cir., 1976).

The District Court should apply the degree of coercion minimally necessary to gain compliance with its Order.

If compliance is not forthcoming, the original penalty could be increased, or a new penalty appropriate under the particular circumstances could be selected.

To have imposed the drastic sanction of incarceration under the peculiar circumstances facing Canon, said circumstances having been fully explored in the original petition for certiorari, is too severe of a penalty.

CONCLUSION

For the foregoing reason, it is respectfully submitted that this Petition for Rehearing be considered and a Writ of Certiorari issue to review the decision in this case in order to ascertain whether a more lenient sanction should have been imposed by the District Court on the Petitioner's original refusal to follow the Court's Order.

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.

By /s/ Oscar B. Goodman
230 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorney for Petitioner

CERTIFICATE OF COUNSEL

OSCAR B. GOODMAN, attorney for Petitioner MICHAEL IRVIN CANON, and duly admitted to practice before this Honorable Court, hereby certifies that this petition for rehearing is presented in good faith and is not presented for the purpose of delay.

It is further certified that the petition for rehearing is restricted to the question presented therein, which question presents a substantial ground available to Petitioner not previously presented, and which presents

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to this Honorable Court a decision of a Circuit Court of Appeal which is of substantial effect.

/s/ Oscar B. Goodman
OSCAR B. GOODMAN

CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that three (3) true and correct copies of the above and foregoing Petition for Rehearing for Writ of Certiorari was, on this 9th day of June, 1976, mailed, postage prepaid, to the Honorable Robert Bork, Solicitor General, United States Department of Justice, Washington, D. C. 20530.